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COURT OF CRIMINAL APPEALS
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No. PD- -21

In the
Court of Criminal Appeals of Texas
At Austin

◆

No. 01-19-01008-CR
In the Court of Appeals
For the First District of Texas
At Houston

◆

No. 2012280
In the County Criminal Court at Law No. 12
Of Harris County, Texas

◆

STATE OF TEXAS
Appellant
V.
LAKESIA KEYON BRENT
Appellee

◆

STATE'S PETITION FOR DISCRETIONARY REVIEW

◆

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

The First Court of Appeals has sanctioned an unending jurisdiction for a trial court to act post-judgment, a thing otherwise unheard of in any other area. The First Court of Appeals approved of a trial court exercising unending jurisdiction to grant judicial clemency. In doing so, the First Court of Appeals has split with the conclusions of five of its sister courts, three of whom also published their opinions. This is an important case because of the implications this has, not only for clemency under art. 42A.701(f), but for other post-judgment actions by trial courts.

The State requests oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. § 38.2 (a)(1)(A), a complete list of the names of all interested parties is provided below.

Counsel for the State:

Kim Ogg — District Attorney of Harris County

John David Crump — Assistant District Attorney on appeal

Daniel Malik — Assistant District Attorney at hearing

Appellant and counsel:

Lakesia Brent — Appellee

Lindsay Bellinger — Assistant Public Defender at hearing

Miranda Meador — Assistant Public Defender on appeal

Trial Judge:

Honorable Robin Brown — Judge Presiding at trial and discharge

Honorable Genesis Draper — Judge Presiding at hearing

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STATEMENT OF THE CASE AND FACTS

The facts necessary for the resolution of this purely legal issue are largely procedural. As such, the Statements of the Case and Facts will be consolidated.

On Feb. 27, 2015, Appellee was charged by criminal information with the misdemeanor offense of theft, which occurred on or about Feb. 17, 2015. (C.R. 06). The underlying facts of the theft are contained only in the affidavit supporting Appellee's arrest warrant. (C.R. 07). Essentially, while a patient at a clinic, Appellee stole a cell phone belonging to another patient. *Id.* On March 13, 2016, a petit jury found Appellee guilty of the offense. (C.R. 46).

On March 04, 2016, the trial court sentenced Appellee to 180 days in the Harris County Jail but suspended that sentences for a period of one year and placed Appellee under community supervision. (C.R. 48). One year later, on March 22, 20217, after the natural expiration of the community supervision, the trial court discharged Appellee. (C.R. 53). Appellee did not appeal the conviction, sentence, or discharge.

Over two-and-a-half years later, Appellee moved for the trial court to grant judicial clemency pursuant to art. 42A.701(f).[1] (C.R. 55-57). On Nov. 19, 2019, the trial court granted Appellee's motion, set aside the jury's verdict, released Appellee's from

[1] In addition to a lack of subsequent convictions, Appellee claimed that she had been a successful business owner for 12 years and had a 17-year-old daughter, with whom Appellee was actively involved. (C.R. 56-57). Based on her claim, both would have been true at the time of the offense.

any further penalties and disabilities related to the conviction, and dismissed the charging instrument. (C.R. 67). The trial court ordered the dismissal of the case and information. (C.R. 69-70). On Dec. 03, 2019, the State gave notice of its intent to appeal.[2] (C.R. 73-74).

On Dec. 10, 2020, the First District Court of Appeals released an opinion affirming the trial court's dismissal. *State v. Brent*, --- S.W.3d ---, No. 01-19-01008_CR, 2020 WL 7251860 (Tex. App.—Houston [1st Dist.] Dec. 10, 2020). In it, the court of appeals overruled the State's two points of error: that the trial court did not have continuing jurisdiction to grant clemency, and that Appellee did not receive the type of discharge that was subject to clemency. *Id.* at *04-06. In doing so, the court of appeals put itself in direct opposition to five other courts of appeals on the issue of jurisdiction. *See*, *State v. Perez*, 494 S.W.3d 901 (Tex. App.—Corpus Christi-Edinburg 2016, no pet.); *State v. Shelton*, 396 S.W.3d 614 (Tex. App.—Amarillo 2012, pet. ref'd); *State v. Fielder*, 376 S.W.3d 784 (Tex. App.—Waco 2011, no pet.); *Poornan v. State*, No. 05-18-00354-CR, 2018 WL 6566688 (Tex. App.—Dallas, Dec. 13, 2018, no pet.)(mem. op., not designated for publication); *Buie v. State*, No. 06-13-00024-CR, 2013 WL 5310532 (Tex. App.—Texarkana Sept. 20, 2013, no pet.)(mem. op., not designated for publication).

The court of appeals started by recognizing that every other court of appeals that has decided this issue has found that trial courts have found that jurisdiction ends,

[2] Because the trial court ordered the charging instrument dismissed, the court of appeals had jurisdiction pursuant to art. 44.01(a). TEX. CODE CRIM. P. Art. 44.01(a).

at most, 30 days after final conviction or discharge. *Id.* at *04 (citing to cases from the 5th, 6th, 7th, 10th, and 13th districts finding plenary power expired after 30 days). The court of appeals then went on to hold that each of these courts incorrectly interpreted art. 42A.701. *Id.* The court of appeals found that there was no language limiting the jurisdiction of a trial court to grant judicial clemency. *Id.* ("This conditional language establishes when a trial court's power to grant judicial clemency *arises*…but it says nothing about when the trial court's power *expires*)(emphasis in original). The court of appeals found that the absence of a limitation meant that jurisdiction was granted. *Id.* at *05 ("But to limit the trial court's authority to consider application for judicial clemency to that period of time immediately concurrent to a mandatory discharge of a defendant within thirty days of the successful completion of community supervision is to read a limitation into the statute that simply is not there")(quoting *Shelton*, 396 S.W.3d at 621 (Tex. App.—Amarillo 2012, pet. ref'd)(Pirtle, J., dissenting)). The court of appeals also found that the "public policy purpose of judicial clemency" demonstrated jurisdiction. *Id.* at *05 (finding "the purpose of judicial clemency" is to relieve defendants who have been rehabilitated, and that rehabilitation is best evaluated on post-discharge conduct).

The court of appeals also rejected the argument that Appellee's discharge was not eligible for clemency because it was not granted under 42A.701.[3] *Id.* at *05-06. The

[3] The Appellee raised a preservation claim to this issue. *Id.* at *06. The court of appeals assumed that the issue was preserved and addressed the merits of the claim. *Id.*

court of appeals found that the only limitations on eligibility were the types of offenses prohibited from early termination listed in 42A.701(g). *Id.* at *06. The court of appeals did not address the language in 42A.701(f) that makes clemency apply only "if the judge discharges the defendant under this article." The court of appeals held that all supervisions, regardless of their resolution, are eligible for clemency if the offense was not listed in 42A.701(g). *Id.*

GROUNDS FOR REVIEW

I. The Court of Appeals for the First District erred when it found, contrary to five other courts of appeals, that a trial court maintains unending jurisdiction over community supervision cases to grant "judicial clemency."

II. The Court of Appeals for the First District erred when it found that all terminated community supervisions, regardless of the conditions under which they were completed, are eligible for "judicial clemency" where the statute restricts the granting of judicial clemency only to those terminations that occur pursuant to the statute.

REASONS FOR GRANTING REVIEW

Review of the first question presented should be granted because the First District Court of Appeals' opinion brings it into direct conflict with five other courts of appeals' decisions on the same issue; decided an important question of state law that has not been, but should be, settled by this Court; and .has so far sanctioned a departure from the usual course of judicial proceedings by a lower court as to call for an exercise of this Court's power of supervision TEX. R. APP. P. 66.3(a), (b) & (f). Namely, this

Court should decide what time limitations there are on a trial court's jurisdiction to grant judicial clemency under TEX. CODE CRIM. P. Art. 42A.701(f).

Review of the ground for review should be granted because the First District Court of Appeals' opinion decided an important question of state law that has not been, but should be, settled by this Court. TEX. R. APP. P. 66.3(b).

FIRST GROUND FOR REVIEW

The First District Court of Appeals erred when it found that trial courts have unlimited time to grant judicial clemency after discharge. Jurisdiction is "the power of a court to hear and determine a case." *State v. Robinson*, 498 S.W.3d 914, 917 (Tex. Crim. App. 2016). "After a trial court imposes a sentence in open court and adjourns for the day, it loses plenary power to modify the sentence unless, within thirty days, the defendant files a motion for new trial or a motion in arrest of judgment." *Id.* at 919. Nonetheless, the court of appeals found that the there was no limitation on a trial court's ability to grant judicial clemency. To do so, the court of appeals claimed that the structure, text and purpose of the statute pointed towards no time limitation *Brent*, --- S.W.3d ---, 2020 WL 7251860, at *05

I. Neither the structure nor the text support the court of appeals' analysis

The court of appeals claimed that the statute's structure indicated that there was no time limitation on a trial court's plenary power to grant judicial clemency. *Id.* But, the court of appeals did not analyze the statute's structure or explain how it indicated that there was no limitation. Instead, as far as the language of the statute is concerned,

the court of appeals found it compelling that there was no explicit limitation on the time to grant judicial clemency. *See*, *Id.* Both the structure and the text of the statute indicate that the power to grant judicial clemency is limited to that time when the trial court discharges the defendant.

The statute generally deals with what qualifies a trial court to order a discharge or early discharge, and what to do when ordering the discharge. The exception, according to the reasoning of the court of appeals, is subsection (f). This is inconsistent with the remainder of the statute, which deals with what to do during the time of discharge.

Further, the language of subsection (f) ties the grant of judicial clemency to a discharge. Specifically, the first sentence of subsection (f) states "If the judge discharges the defendant under this article, the judge may set aside the verdict…" TEX. CODE CRIM. P. Art. 42A.701(f). Another portion of the statute mandates a court, upon successful completion of probation conditions, to reform the sentence and discharge a defendant. *Id.* at (e). These, taken together, indicate that a court may grant clemency at the time of discharge, or perhaps during its plenary power period, but not afterwards. *C.f.*, *Shelton*, 396 S.W.3d at 617-18 (finding same).

Finally, the language of subsection (f-1) further shows that discharge and clemency are supposed to occur that the same time. Subsection (f-1) directs the Office of Court Administration ("OCA") to adopt a form that "provide[s] for the judge to" either "discharge the defendant," or "discharge the defendant, set aside the verdict…"

TEX. CODE CRIM. P. Art. 42A.701(f-1). The Legislature has indicated that the discharge and clemency decision are to occur at the same time. Appellee's discharge form reflects this, as there are two sections available to indicate a discharge and dismissal. (C.R. 53). Notably, subsection (f-1) does not include a requirement for a trial court to make a finding of satisfactory fulfillment for later use.

In finding that there was no time limit on the grant of judicial clemency, the court of appeals has imbued trial courts with unending jurisdiction – a thing unmatched in any other context. The court of appeals found the lack of an explicit limitation indicated that there was no limitation. *Id.* (the statute states "when a trial court's power to grant judicial clemency *arises*…but it says nothing about when the trial court's power *expires*")(emphasis in original). That is, the statute's silence about any time limitation, the court of appeals found, meant that there was no limitation. *Id.* ("to limit the trial court's authority [to grant judicial clemency]…is to read a limitation into the statute that simply is not there")(quoting *Shelton*, 396 S.W.3d at 621 (Pirtle, J., dissenting)).

The court of appeals ignored that continuing jurisdiction is not the norm; a court's plenary power has limitations. *See*, *Robinson*, 498 S.W.3d at 919. Indeed, if the lack of statutory limitation granted unlimited jurisdiction, then the entire concept of plenary power would be unnecessary. And the Legislature knows how to extend a court's jurisdiction to act on a case once judgment has been rendered. *See*, *e.g.*, TEX. CODE CRIM. P. Art. 42A.201 & 42A.202 (extending jurisdiction for courts to grant "shock probation" in misdemeanor and felony cases). The fact that the Legislature did

not include a time limitation does not indicate there is no time limitation; instead, the fact that the Legislature did not include a time *extension* indicates that there is a limitation. *See*, *State v. Patrick*, 86 S.W.3d 592, 595 n.13 (Tex. Crim. App. 2002)(rejecting a defendant's claim of continuing jurisdiction to grant DNA testing outside of Chapter 64 because of lack of legislative grant, and listing statutes where legislature has granted continuing jurisdiction).

II. The court of appeals' policy argument is flawed and ignores the equally compelling policy arguments against unlimited jurisdiction

The chief reasoning that the court of appeals gave for its opinion was that the public policy behind judicial clemency favored no limitation. *See*, *Brent*, --- S.W.3d ---, 2020 WL 7261860, at *05 ("More importantly, the creation of such a limitation is inconsistent with the public policy purpose of judicial clemency altogether")(internal quotations omitted).[4] However, before courts may imbue its own public policy determinations onto the Legislature's words, there must be an ambiguity in the language or an inevitable absurd result without it. *See*, *Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991)(where plain meaning of statute is clear, it is not for courts to add or subtract to its language; it is only when the language is ambiguous and would

[4] The clarity of the passage of time often gives much more information, not just in clemency cases. If the court of appeals' reasoning is adopted – that more post-judgment information is helpful for decisions, and therefore jurisdiction should be granted – then other areas will be impacted.

lead to absurd results that it is constitutionally permissible to interpret meaning into a statute).

The language of 42A.701 is only ambiguous if every statute the Legislature passed required a statement on how long a court's jurisdiction lasted. That is not the case. It is the *very* rare exception, not the rule, for statutes to contain a statement extending a court's jurisdiction after completion of a case. *See*, *e.g.*, *Patrick*, 86 S.W.3d at 595 n.13 (listing handful of statutes that extend jurisdiction). The court of appeals resorted to its own policy determinations before it was necessary.

Even assuming the lack of jurisdiction language in the statute creates an ambiguity, it would not be absurd to tie the decision to grant clemency to the discharge. The court of appeals found that judicial clemency was a form of relief for defendants who are "completely rehabilitated." *Brent*, --- S.W.3d ---, 2020 WL 7251860 at *05. The court of appeals then went on to decide that "the best evidence of rehabilitation will often be the defendant's conduct post-discharge, when the defendant is no longer under direct supervision and threat of revocation." *Id.* However, the reasons to require a trial court to make its clemency decision at the time of discharge are also compelling.

At the time of discharge, the trial court has the greatest amount of information about a defendant's rehabilitation. By the time of discharge the trial court would have been monitoring the defendant for a long period of time. The trial court would know the advances or regression that the defendant made in his or her rehabilitation. It is at this point that the trial court would be in the best position to make its decision. Once

a defendant is discharged from community supervision, the trial court has no way to monitor him or her. The State, for that matter, has very little way to monitor him or her and make a substantial decision of whether to oppose or agree with the decision to grant clemency.

Due to the lack of supervision, the decision practically distills down to whether the defendant has, since discharge, been caught for a criminal offense. That is the case here. The Appellee's lack of subsequent criminal history in the roughly two years since discharge was essentially the only evidence that changed between discharge and clemency.[5] And that would be the same in almost every case brought well-after discharge. But if the Legislature wanted that to be the deciding factor, as it was here, it could have made that a requirement of the statute.

The possibility of judicial clemency is also a powerful motivator for compliance with the terms and conditions of a community supervision. If a defendant knows that the decision to grant clemency is limited to a review of the time of supervision, the defendant is incentivized to complete the requirements and refrain from reoffending or failing his or her conditions. If, on the other hand, a defendant knows that clemency is

[5] As noted above, the Appellee claimed that she was a mother to a 17-year-old daughter and a business owner for 12 years. (C.R. 56-57). Both of these claims would have been true at the time of her offense four years earlier.

available after being free from judicial supervision – and thus, judicial scrutiny – then the incentive to comply with conditions is decreased.[6]

On a more practical level, it is particularly disturbing when a court can grant itself something as fundamental jurisdiction by divining the tea leaves of the always-amorphous "legislative policy." Without jurisdiction, a court is powerless to act. *Patrick*, 86 S.W.3d at 595. "[A] source of jurisdiction must be found to authorize [a] trial court's orders." *Id.* That "source" of a court's jurisdiction cannot be the *ipsit dixit* of the same court.

There is nothing absurd in the statute that would require a court to read into it an unlimited extension of jurisdiction. The Legislature could have included an extension of jurisdiction, but it chose not to. The court of appeals erred in finding otherwise.

SECOND GROUND FOR REVIEW

Appellee was discharged from her community supervision by the natural expiration of her supervision period. (C.R. 53). Appellee was not satisfactorily discharged under art. 42A.701. Clemency under art. 42A.701(f) is limited to discharges "under this article." TEX. CODE CRIM. P. Art. 42A.701(f). Despite this, the court of appeals found that Appellee's discharge was eligible for clemency under art. 42A.701(f).

[6] The Appellee, for example, did not satisfactorily complete her terms and conditions of probation. Instead, the Appellee was discharged because her period of supervision had ended. (C.R. 53)(noting "The period having expired, defendant is discharged by operation of law," and not indicating any in any fields that Appellee had satisfactorily completed her terms and conditions).

Brent, --- S.W.3d ---, 2020 WL 7251860, at *06. The court of appeals did not dispense with the requirement in subsection (f) that a discharge be done pursuant to art 42A.701.

Instead, the court of appeals found that art. 42A.701 sets out two types of discharges: permissive and mandatory. *Id.* Specifically, the court of appeals characterized Appellee's discharge as being a "mandatory" discharge under art. 42A.701(e). But, a "mandatory" discharge under art. 42A.701(e) still requires that the defendant satisfactorily complete the terms and conditions of his or her supervision. TEX. CODE CRIM. P. Art. 42A.701(e)("On the satisfactory fulfillment of the conditions of community supervision and the expiration of the period of community supervision…"). The court of appeals ignored the requirement that a defendant satisfactorily fulfill – or even simply fulfill – the terms and conditions of supervision.

Under the court of appeals' reasoning, all discharges are eligible for clemency under subsection (f). The court of appeals omission fails to account for all types of discharges that may occur at the end of a defendant's supervision. For example, if a defendant fails to satisfactorily fulfill the terms and conditions of his or her community supervision, the court may revoke or extend his or her supervision period. *See*, TEX. CODE CRIM. P. Arts. 42A.751 & 42A.753. The trial court may also decide to take no action. If the trial court does so, the defendant's supervision will terminate at some point. The supervision will discharge, eventually, due to the natural expiration of the supervision period. This does not, however, mean that the defendant satisfactorily fulfilled their terms and conditions.

In Appellee's case, the discharge form indicates that "[t]he period having expired, defendant is **discharged** by operation of law." (C.R. 53)(bold in original). There is nothing in the record to indicate that Appellee was discharged for satisfactorily fulfilling her terms and conditions. Instead, the record demonstrates that Appellee's discharge was due to the natural expiration of her community service period. There are sections of the discharge form in which the trial court could have found that Appellee satisfactorily fulfilled her terms and conditions, but it did not. Appellee never stated or claimed that she had satisfactorily fulfilled her terms and conditions.

The court of appeals went on to find that the trial court made implied findings that Appellee satisfactorily fulfilled her terms and conditions. *Brent*, --- S.W.3d ---, 2020 WL 7251860, at *06. The court of appeals based that on the "express findings" that Appellee was rehabilitated. *Id.*; *see also*, (C.R. 67). But the record contains no evidence to support that finding.

Appellate courts "should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). An appellate court may imply factual findings where necessary to support the judgment. *Gutierrez v. State*, 221 S.W.3d 680, 667 (Tex. Crim. App. 2007)(implying a finding to support a trial court's denial of a motion to suppress). However, that implied finding must be rooted and supported in the record. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

To the extent that the trial court may have made implied findings that Appellee satisfactorily fulfilled her terms and conditions, there is nothing in the record that speaks to how Appellee fared on her community supervision. The only thing that the record shows is that she was discharged because the supervision period was over. (C.R. 53). A factual finding of Appellee's rehabilitation is separate and apart from her conduct while supervised. In fact, the trial court and court of appeal's policy determination suggest otherwise. Both support their jurisdictional finding by claiming that a defendant's post-discharge conduct was determinative. (R.R. III 05-07); *Brent*, --- S.W.3d ---, 2020 WL 7251860, at *05. If Appellee had satisfactorily fulfilled her terms and conditions the trial court would have been well-aware of whether Appellee deserved clemency. And, at the time that Appellee was discharged, the trial court determined that she did not.

Appellee's discharge was ineligible for clemency under art. 42A.701(f). There is nothing in the record to expressly indicate that Appellee satisfactorily fulfilled her terms and conditions. There is nothing in the record to support an implied finding of the same. The court of appeals erred in finding there was.

CONCLUSION

The State asks this Court to grant review of the First Court's decision and reverse its judgment.

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CERTIFICATE OF COMPLIANCE & SERVICE

The undersigned certifies that, according to Microsoft Word, the portions of this brief for which TEX. R. APP. P. § 9.4(i)(2)(d) requires a word count contains 3,962 words.

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APPENDIX

***State v. Brent*, --- S.W.3d ---, No. 01-19-01008_CR, 2020 WL 7251860 (Tex. App.—Houston [1st Dist.] Dec. 10, 2020, pet. filed)**

Opinion issued December 10, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-01008-CR

THE STATE OF TEXAS, Appellant

V.

LAKESIA KEYON BRENT, Appellee

On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Case No. 2012280

O P I N I O N

Lakesia Brent was convicted for misdemeanor theft and placed on community supervision. Brent successfully completed community supervision, and the trial court entered an order discharging her. *See* TEX. CODE CRIM. PROC. art. 42A.701(e). Over two-and-a-half-years later, Brent filed a motion for judicial

clemency, *see id.* art. 42A.701(f), which the trial court granted over the State's jurisdictional objection.

On appeal, the State argues that the trial court lacked jurisdiction to grant Brent's motion because (1) its power to grant judicial clemency expired 30 days after the entry of its order discharging Brent from community supervision and (2) Brent did not receive a type of discharge eligible for judicial clemency.

We affirm.

Background

This appeal presents pure questions of law. The material facts are simple and undisputed.

On March 3, 2016, Brent was tried and convicted by a jury for misdemeanor theft. The next day, the trial court entered its Judgment of Conviction by Jury, which sentenced Brent to 180 days in the county jail, suspended the sentence for a period of one year, and placed Brent on community supervision.

On March 22, 2017, the trial court entered an Order Affecting Community Supervision, in which the trial court found that Brent's period of community supervision had "expired" and that she was therefore "discharged by operation of law."

On November 1, 2019, Brent filed her Motion to Set Aside the Verdict and Dismiss Pursuant to Texas Code of Criminal Procedure Art. 42A.701(f). In her

motion, Brent asserted that she was completely rehabilitated and ready to re-take her place as a law-abiding member of society and therefore entitled to "judicial clemency" under article 42A.701(f). She requested that the trial court set aside the jury's verdict, dismiss the charging instrument, and order that she be released from all penalties and disabilities resulting from her conviction.

On November 8, 2019, the State filed its Response, objecting that the trial court's jurisdiction to grant Brent's motion expired 30 days after the entry of its discharge order on April 21, 2017. The State did not otherwise dispute that Brent qualified for judicial clemency.

On November 12, 2019, the trial court held a hearing and orally granted Brent's motion.

On November 18, 2019, the trial court entered Findings of Fact and Conclusions of Law in support of its ruling. The trial court found that it was undisputed that Brent was rehabilitated and ready to re-take her place as law-abiding member of society. The trial court concluded that it had jurisdiction to grant judicial clemency because article 42A.701 does not limit "the time period during which either regular discharge or judicial clemency must be ordered." The trial court reasoned that the statute is most logically construed as setting no deadline for granting judicial clemency given that (1) the evidence developed during the period of community supervision is often insufficient for trial courts to

determine whether the defendant is fully rehabilitated and (b) defendants do not have a right to counsel or an automatic hearing at the time of discharge and are thus deprived of the resources necessary to show their rehabilitation and advocate for judicial clemency at that time. The trial court therefore granted Brent's motion for judicial clemency and ordered that the verdict be set aside, the charging instrument be dismissed, and Brent be released from all further penalties and disabilities related to her conviction. The next day, the trial court entered a Set Aside Order, which withdrew its Judgment of Conviction by Jury and dismissed the case.

The State appeals.

Jurisdiction

On appeal, the State argues that the trial court lacked jurisdiction to grant Brent's motion for judicial clemency because (1) the trial court's power to grant judicial clemency expired 30 days after the entry of its order discharging Brent from community supervision and (2) Brent did not receive the type of discharge that is eligible for judicial clemency under article 42A.701.

A. Standard of review

This appeal involves issues of jurisdiction and statutory construction, both of which are questions of law that we review de novo. *Bell v. State*, 569 S.W.3d 241, 244 (Tex. App.—Houston [1st Dist.] 2018, pet. granted).

B. Applicable law

1. Jurisdiction

Jurisdiction refers to a court's power to adjudicate a matter in a given case. *Garcia v. Dial*, 596 S.W.2d 524, 527 (Tex. Crim. App. 1980). It is an absolute systemic requirement. *State v. Dunbar*, 297 S.W.3d 777, 780 (Tex. Crim. App. 2009). If a court does not have jurisdiction, it does not have power to act. *Id.* Thus, every act of a court must be based on some source of jurisdiction. *State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002).

The principle sources of a trial court's jurisdiction over the subject matter of a case consist of express grants of power conferred by constitution, statute, or common law. *See Dunbar*, 297 S.W.3d at 780 ("A trial court's jurisdiction over a criminal case consists of the power of the court over the subject matter of the case, conveyed by statute or constitutional provision . . . ."); *State v. Johnson*, 821 S.W.2d 609, 612 (Tex. Crim. App. 1991) ("Generally speaking, a court's authority to act is limited to those actions authorized by constitution, statute, or common law.").

Additional sources of jurisdiction consist of grants of inherent and implied power. *Johnson*, 821 S.W.2d at 612. A trial court's "inherent" powers are those "which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, or in the preservation of its independence and integrity."

Id. A trial court's "implied" powers are those which "aris[e] from," *id.*, and are exercised "in furtherance of" express grants of power. *Patrick*, 86 S.W.3d at 595; *see also Ex parte Hughes*, 129 S.W.2d 270, 273–74 (Tex. 1939) ("[O]ur courts have such powers and jurisdiction as are directly provided by law, and, in addition thereto, they have such further powers and jurisdiction as are reasonably proper and necessary,-that is, as ought to be inferred, from the powers and jurisdiction directly granted.").

2. Article 42A.701

The statute at issue in this appeal is Code of Criminal Procedure, article 42A.701. Entitled "Reduction or Termination of Community Supervision Period," article 42A.701 establishes the circumstances under which a trial court may and must discharge a defendant from community supervision. *See generally* TEX. CODE CRIM. PROC. art. 42A.701. It provides for two types of discharge, one permissive and one mandatory. *Id.* art. 42A.701(a), (e).

The permissive discharge is addressed in subsection (a). It provides:

> At any time after the defendant has satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less, the judge may reduce or terminate the period of community supervision.

Id. art. 42A.701(a).

The mandatory discharge is addressed in subsection (e). It provides:

> On the satisfactory fulfillment of the conditions of community supervision and the expiration of the period of community supervision, the judge by order shall:
> (1) amend or modify the original sentence imposed, if necessary, to conform to the community supervision period; and
> (2) discharge the defendant.

Id. art. 42A.701(e).

As the Court of Criminal Appeals explains, a discharge under either subsection is a recognition that the defendant "has paid his debt to society . . . ." *Cuellar v. State*, 70 S.W.3d 815, 818 (Tex. Crim. App. 2002). When a defendant is discharged, he "in effect, 'graduates' from community supervision" though he remains convicted of the offense. *Id.*

In addition to discharge from community supervision, article 42A.701 establishes another type of relief for criminal defendants. TEX. CODE CRIM. PROC. art. 42A.701(f). Colloquially referred to as "judicial clemency," this second type of relief is available "when a trial judge believes that a person on community supervision is completely rehabilitated and is ready to re-take his place as a law-abiding member of society . . . ." *Cuellar*, 70 S.W.3d at 819.

Judicial clemency is addressed in subsection (f). It provides:

> If the judge discharges the defendant under this article, the judge may set aside the verdict or permit the defendant to withdraw the defendant's plea. A judge acting under this subsection shall dismiss the accusation, complaint, information, or indictment against the defendant. A defendant who receives a discharge and dismissal under this subsection is released from all penalties and disabilities resulting from the offense of which the defendant has been convicted or to

> which the defendant has pleaded guilty [subject to certain exceptions not applicable here].

TEX. CODE CRIM. PROC. art. 42A.701(f).

As the permissive text makes clear, whether to grant judicial clemency "is wholly within the discretion of the trial court." *Cuellar*, 70 S.W.3d at 820. If the trial court grants judicial clemency, "the conviction is wiped away, the indictment [is] dismissed, and the [defendant] is free to walk away from the courtroom released from all penalties and disabilities resulting from the conviction." *Id.* at 818 (quotations omitted). With limited exceptions,[1] once the trial court grants judicial clemency, "the felony conviction disappears . . . ." *Id.* at 820. Thus, unlike a defendant who has been merely discharged, a defendant who has been granted judicial clemency is no longer convicted of the offense. *Id.*

Article 42A.701 and its predecessors have never contained language specifying whether and if so when a trial court may grant judicial clemency after discharging the defendant from community supervision. Nor has the statute ever specified whether an order discharging the defendant—but not expressly finding

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[1] The statute creates two exceptions. First, if the defendant is convicted of a later offense, the defendant must still disclose the earlier dismissed conviction to the trial court. TEX. CODE CRIM. PROC. art. 42A.701(f)(1). Second, if the defendant is an applicant for or holder of a license to operate a daycare or other child-care facility under Chapter 42 of the Human Resources Code, the Department of Family and Protective Services, which is responsible for licensing all child-care operations in the state, "may consider the fact that the defendant previously has received community supervision" in determining whether to issue, renew, deny, or revoke the license. *Id.* art. 42A.701(f)(2).

the defendant satisfied the conditions of community supervision—qualifies as a discharge under the statute. In this appeal, we address both issues.

C. Analysis

1. The trial court's power to grant judicial clemency

We begin by considering the State's argument that the trial court lacked jurisdiction to grant Brent's motion because its power to grant judicial clemency expired 30 days after the entry of its discharge order. In support of its argument, the State cites to opinions issued by five of our sister courts, each of which holds that a trial court's jurisdiction to grant judicial clemency expires 30 days after entry of an order discharging the defendant from community supervision. *See State v. Perez*, 494 S.W.3d 901, 905 (Tex. App.—Corpus Christi 2016, no pet.); *State v. Shelton*, 396 S.W.3d 614, 619 (Tex. App.—Amarillo 2012, pet. ref'd); *State v. Fielder*, 376 S.W.3d 784, 784–85 (Tex. App.—Waco 2011, no pet.); *Poornan v. State*, No. 05-18-00354-CR, 2018 WL 6566688, at *2 (Tex. App.—Dallas, Dec. 13, 2018, no pet.) (mem. op., not designated for publication); *Buie v. State*, No. 06-13-00024-CR, 2013 WL 5310532, at *2 (Tex. App.—Texarkana Sept. 20, 2013, no pet.) (mem. op., not designated for publication).

These opinions, of course, constitute persuasive authority, which is not binding on this Court. *Cannon v. State*, 691 S.W.2d 664, 679–80 (Tex. Crim. App. 1985) ("It is rudimentary that courts are not bound by decision of other courts of

equal jurisdiction."). Their holdings, more importantly, rest on an erroneous construction of article 42A.701, one that requires the trial court to discharge the defendant and grant judicial clemency *at the same time*. *See, e.g.*, *Shelton*, 396 S.W.3d at 618 ("We think the sentences [addressing discharge and judicial clemency], taken together, indicate the Legislature intended the judicial clemency decision to be made at the same time as the "usual" discharge.").

If the statute required the trial court to discharge the defendant and grant judicial clemency at the same time as part of a single proceeding, then we would agree that the trial court retains plenary power over the proceeding for 30 days after the entry of its discharge order, at which point its jurisdiction to grant judicial clemency expires. *See Perez*, 494 S.W.3d at 905 ("Thus, absent further guidance from the Texas Court of Criminal Appeals or the Legislature, we conclude that the trial court must order judicial clemency upon or after either mandatory or permissive discharge occurs, but before the trial court loses plenary jurisdiction."). But, like Justice Pirtle of the Amarillo Court of Appeals, we see no textual basis for imposing such a requirement. *See State v. Shelton*, 396 S.W.3d 614, 621 (Tex. App.—Amarillo 2012, pet. ref'd) (Pirtle, J., dissenting) ("With all due respect, I simply do not read such a limitation into the juxtaposition of these two sentences [addressing discharge and judicial clemency]."). Discharge and judicial clemency are separate forms of relief, created and governed by separate parts of the statute.

TEX. CODE CRIM. PROC. art. 42A.701(e) (discharge); *id.* art. 42A.701(f) (judicial clemency).

The two are, however, related. Under the statute, discharge from community supervision is a precondition for judicial clemency. The statute provides that "[i]f the judge discharges the defendant under this article, the judge may [grant judicial clemency]." *Id.* art. 42A.701(f). A judge may grant judicial clemency, but only if the judge discharges the defendant from community supervision. This conditional language establishes when a trial court's power to grant judicial clemency *arises* (when the trial court discharges the defendant), but it says nothing about when the trial court's power *expires*.

Trial courts may in practice generally exercise this power when discharging the defendant from community supervision. *But see Cuellar,* 70 S.W.3d at 815 (granting judicial clemency more than two months after defendant completed community supervision). But "[t]o limit the trial court's authority to consider an application for judicial clemency to that period of time immediately concurrent to a mandatory discharge of a defendant within thirty days of the successful completion of community supervision is to read a limitation into the statute that simply is not there." *Shelton*, 396 S.W.3d at 621 (Pirtle, J., dissenting). More importantly, "the creation of such a limitation is inconsistent with the public policy purpose of judicial clemency altogether." *Id.*

The purpose of judicial clemency is to grant a special form of relief to defendants who have been "completely rehabilitated." *Cuellar*, 70 S.W.3d at 819. But rehabilitation is a process. Many defendants will not be completely rehabilitated until sometime after they are discharged from community supervision. Moreover, the best evidence of rehabilitation will often be the defendant's conduct post-discharge, when the defendant is no longer under direct supervision and threat of revocation. Thus, limiting a trial court's jurisdiction to grant judicial clemency to 30 days after discharges inhibits the court's ability to assess whether the defendant is rehabilitated and thwarts the purpose of the statute.

In sum, based on the statute's text, structure, and purpose, we hold that article 42A.701 gives trial courts the discretionary power to grant judicial clemency at any time after the defendant is discharged from community supervision under the article. Because the trial court granted Brent's motion after discharging her from community supervision and had not previously entered an order granting or denying judicial clemency, we hold that the trial court had jurisdiction to grant the motion.

2. Brent's eligibility for judicial clemency

We now turn to the State's argument that the trial court lacked jurisdiction to grant Brent's motion because she did not receive the type of discharge for which judicial clemency is available. The State construes article 42A.701 as establishing

two types of discharge: (1) "early" discharge under subsection (a) and (2) "satisfactory" discharge under subsection (e). The State contends that article 42A.701 does not apply to so-called "natural" discharges, in which the defendant is discharged due to the "natural expiration" of the period of community supervision rather than the defendant's satisfactory fulfillment of the terms and conditions of community supervision. In its form discharge order, the trial court found that Brent's period of community supervision had "expired" and therefore ruled that Brent was "discharged by operation of law." But the trial court did not expressly find that Brent had satisfied the terms and conditions of her community supervision. Because the trial court made no such an express finding, the State argues that Brent received a "natural" discharge falling outside the scope of article 42A.701 and was thus ineligible for judicial clemency.

Brent responds that the State has failed to preserve error because it did not make this argument in the proceedings below. Brent further responds that she was discharged under article 42A.701 and thus eligible for judicial clemency.

Assuming without deciding the State's argument is preserved for our review, we hold that it erroneously characterizes Brent's discharge from community supervision as falling outside the scope of article 42A.701.

Article 42A.701 broadly applies to any offense for which a defendant has been sentenced to community supervision, except for those offenses expressly exempted by the statute. This is clear from the statute's text and structure.

The statute begins by establishing when a trial court may and must discharge (or consider discharging) a defendant from community supervision—but without specifying the offenses to which the statute applies. *Id.* 42A.701(a), (b), (e). The statute then establishes when a trial court may grant judicial clemency—but again without specifying the offenses to which the statute applies. *Id.* art. 42A.701(f). In recent amendments, the statute goes on to impose a duty on trial courts to use a standardized form in discharging defendants and sets forth the form's basic requirements, including an admonition that a defendant who receives judicial clemency is "released from the penalties and disabilities resulting from the offense . . . ." *Id.* art. 42A.701(f-1); *see* Act of June 15, 2017, 85th Leg., R.S., ch. 1017, § 3 (codified at TEX. CODE CRIM. PROC. art. 42A.701(f-1)). Only then, in the final subsection, does the statute specify three types of offenses to which it does not apply. TEX. CODE CRIM. PROC. art. 42A.701(g). By setting forth provisions of general applicability, and then carving out exemptions from those provisions, the statute makes clear that it applies to any offense for which a defendant has been sentenced to community supervision, except for those offenses exempted by statute.

Here, Brent was convicted of misdemeanor theft. Misdemeanor theft is not listed among the offenses exempted from the scope of article 42A.701. *Id.* art. 42A.701(g). Therefore, Brent's conviction fell within the scope of article 42A.701. Under article 42A.701, there are two types of discharge: permissive and mandatory. *Id.* art. 42A.701(a), (e). If the defendant receives either type of discharge, the defendant is eligible for judicial clemency. *Id.* art. 42A.701(f). In this case, Brent received a mandatory discharge. She was therefore eligible for judicial clemency.

Our conclusion is further supported by the absence of any contrary authority. The State has failed to cite any statute, opinion, or other legal authority establishing a "natural" discharge for when the period of community supervision ends before the defendant fulfills all the terms and conditions. Nor are we aware of any such authority. In the absence of such authority, we hold that Brent's misdemeanor theft conviction fell within the scope of article 42A.701, that Brent received mandatory discharge under the statute, and that Brent was therefore eligible for judicial clemency.

Finally, to the extent Brent's eligibility for judicial clemency depended on her satisfactory fulfillment of the terms and conditions of her community supervision, we observe that the trial court found, and it is undisputed, that Brent is completely rehabilitated and ready to re-take her place as a law-abiding member of

society. We further observe that these express findings rest in part on implied findings that Brent fulfilled the terms and conditions of her community supervision. Because it is undisputed that Brent is rehabilitated, it is also undisputed that Brent successfully completed community supervision.

We hold that Brent was eligible for judicial clemency.

We overrule the State's sole issue.

Conclusion

We affirm.

Gordon Goodman
Justice

Panel consists of Justices Kelly, Goodman, and Countiss.

Publish. TEX. R. APP. P. 47.2(b).

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